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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 STEVE BADUE,)
11 Petitioner,) No C 07-4612 VRW (PR)
12 vs.) ORDER GRANTING
13 R WATKINS, Parole Agent,) MOTION TO DISMISS
14 Respondent.) (Doc # 16)
15 _____)
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17 Petitioner seeks a writ of habeas corpus under 28 USC § 2254. Per order
18 filed on January 10, 2008, the court noted that the petition appears untimely and
19 ordered respondent to move to dismiss the petition on the ground that it is
20 untimely or otherwise inform the court that respondent is of the opinion that a
21 motion to dismiss is unwarranted in this case. Respondent promptly filed a
22 motion to dismiss the petition as untimely under 28 USC § 2244(d). Petitioner
23 filed an opposition before respondent filed the motion to dismiss.

24 **BACKGROUND**

25 Petitioner was convicted of failure to register as a sex offender after a
26 court trial in Santa Clara County superior court. The trial court also found that
27 petitioner had suffered a prior prison term and, on March 6, 2003, sentenced him
28 to the middle term of two years in state prison.

1 On April 19, 2004, the California Court of Appeal affirmed the judgment
2 of the trial court. Petitioner did not seek review in the Supreme Court of
3 California.

4 On July 23, 2007, petitioner filed a petition for a writ of habeas corpus in
5 the Supreme Court of California. It was denied on August 15, 2007.

6 On September 6, 2007, petitioner filed the instant petition for a writ of
7 habeas corpus under 28 USC § 2254.

8 DISCUSSION

9 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")
10 became law on April 24, 1996 and imposed for the first time a statute of
11 limitation on petitions for a writ of habeas corpus filed by state prisoners.
12 Petitions filed by prisoners challenging non-capital state convictions or sentences
13 must be filed within one year of the latest of the date on which: (1) the judgment
14 became final after the conclusion of direct review or the time passed for seeking
15 direct review; (2) an impediment to filing an application created by
16 unconstitutional state action was removed, if such action prevented petitioner
17 from filing; (3) the constitutional right asserted was recognized by the Supreme
18 Court, if the right was newly recognized by the Supreme Court and made
19 retroactive to cases on collateral review; or (4) the factual predicate of the claim
20 could have been discovered through the exercise of due diligence. See 28 USC
21 § 2244(d)(1). Time during which a properly filed application for state post-
22 conviction or other collateral review is pending is excluded from the one-year
23 time limit. Id § 2244(d)(2).

24 A state prisoner with a conviction finalized after April 24, 1996, such as
25 petitioner, ordinarily must file his federal habeas petition within one year of the
26 date his process of direct review came to an end. See Calderon v United States

1 District Court (Beeler), 128 F3d 1283, 1286 (9th Cir 1997), overruled in part on
2 other grounds by Calderon v United States District Court (Kelly), 163 F3d 530
3 (9th Cir 1998) (en banc). Here, because petitioner did not seek review from the
4 Supreme Court of California after the California Court of Appeal affirmed the
5 judgment of the trial court on April 19, 2004, petitioner's process of direct review
6 came to an end on May 29, 2004, when the time allotted for seeking review from
7 the state high court expired. The one-year limitation period accordingly began
8 running against petitioner the next day, May 30, 2004. See Smith v Duncan, 297
9 F3d 809, 812-13 (9th Cir 2002) (limitation period began running day after time to
10 seek discretionary review of California Court of Appeal's decision in the
11 Supreme Court of California expired, which was 40 days after the Court of
12 Appeal filed its opinion) (citing Cal Rules of Court 24(a), 28(b), 45(a); Cal Civ
13 Proc Code § 12a). The instant petition was not filed until September 6, 2007,
14 however.

15 Section 2244(d)(2) tolls the one-year limitation period for the "time during
16 which a properly filed application for State post-conviction or other collateral
17 review with respect to the pertinent judgment or claim is pending." 28 USC §
18 2244(d)(2). Unfortunately for petitioner, by the time he filed his first post-appeal
19 state habeas petition on July 23, 2007, the one-year limitation period had already
20 expired on May 30, 2005.¹ A state habeas petition filed after AEDPA's statute of
21 limitation ended cannot toll the limitation period under § 2244(d)(2). See
22 Ferguson v Palmateer, 321 F3d 820, 823 (9th Cir 2003); Jiminez v Rice, 276 F3d

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24 ¹Although petitioner filed several pre-conviction habeas petitions in the
25 state courts, he is not entitled to tolling under § 2244(d)(2) for the more than
26 three years that transpired before he filed his final state habeas petition on July
27 23, 2007. See Evans v Chavis, 546 US 189, 197 (2006) (rejecting interval
28 tolling for gaps of more than the 30 to 60 days that most states provide for filing
an appeal to the next level of review).

1 478, 482 (9th Cir 2001). Section 2244(d)(2) cannot "revive" the limitation period
2 once it has run (ie, restart the clock to zero); it can only serve to pause a clock
3 that has not yet fully run. "Once the limitations period is expired, collateral
4 petitions can no longer serve to avoid the statute of limitations." Rashid v
5 Kuhlmann, 991 F Supp 254, 259 (SDNY 1998).

6 Petitioner is not entitled to equitable tolling either. He has set forth no
7 basis whatsoever to justify that this "extraordinary exclusion" should apply to
8 him. Miranda v Castro, 292 F3d 1063, 1065 (9th Cir 2002) (petitioner bears
9 burden of showing that equitable tolling should apply to him). The federal
10 petition filed on September 6, 2007 is untimely.

11 CONCLUSION

12 For the foregoing reasons, respondent's motion to dismiss the petition as
13 untimely (doc # 16) is GRANTED.

14 The clerk shall enter judgment in favor of respondent, terminate all
15 pending motions as moot, and close the file.

16 SO ORDERED.



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18 VAUGHN R WALKER
United States District Chief Judge